UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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SATISH DESHPANDE, M.D.,

Plaintiff,

against

MEMORANDUM & ORDER
05-CV-2894 (NGG)(VVP)

TJH MEDICAL SERVICES, P.C., MEDISYS MANAGEMENT, LLC, MEDISYS HEALTH NETWORK, INC., and THE JAMAICA HOSPITAL MEDICAL CENTER; THOMAS SANTUCCI, *individually and as an aider and abettor*; PAULINE MARKS, *individually and as an aider and abettor*; RICHARD PINSKER, *individually and as an aider and abettor*; and SURENDRA MAHADEVIA, *individually and as an aider and abettor*,

Defendants.
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GARAUFIS, United States District Judge.

Defendants TJH Medical Services, P.C. ("TJH"); Medisys Management, LLC ("Medisys Management"); Medisys Health Network, Inc. ("Medisys Health"); the Jamaica Hospital Medical Center ("Jamaica Hospital"); Thomas Santucci, individually and as an aider and abettor; Pauline Marks ("Marks"), individually and as an aider and abettor; Richard Pinsker ("Pinsker"), individually and as an aider and abettor; and Surendra Mahadevia ("Mahadevia"), individually and as an aider and abettor (collectively, "Defendants"), move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Plaintiff moves to amend his discrimination claims. For the reasons set forth below, Defendants' motion is GRANTED as to Plaintiff's Fair Labor Standards Act ("FLSA") and Sherman Act claims, DENIED as to Plaintiff's Title VII retaliation claim, and GRANTED in part as to Plaintiff's Title VII discrimination claim for alleged activities that occurred before June 1, 2004. I also dismiss this

action as against Dr. William O'Connell. Plaintiff's motion to amend his complaint is GRANTED.

I. FACTUAL BACKGROUND

As this is a motion to dismiss under Fed. R. Civ. P. 12(b)(6), this recitation of the facts shall presume the truth of all facts as alleged by the Plaintiff, and allow for all permissible inferences in favor of Plaintiff's claims.

Plaintiff Satish Deshpane, M.D. ("Deshpande" or "Plaintiff") commenced his employment with defendant Jamaica Hospital as a faculty supervisor in the Department of Medicine in or around March 9, 1994. (Am. Compl. ¶ 7(a).) At that time, Plaintiff entered into an employment contract with Jamaica Hospital specifying his employment for no less than forty hours per week. (Id. ¶¶ 7(a), (b) and (d).) Plaintiff was informed that he had to utilize a daily time card, work at least forty hours each week, and account for each hour that he worked on his attendance sheets. (Id. ¶¶ 7(a)-(b).) Plaintiff was required to work on weekends, holidays and weekends by Jamaica Hospital and Dr. Thomas Santucci, the Chairman of the Department of Medicine, for which he was never paid overtime. (Id. ¶¶ 7(b), (c), and (i).) Plaintiff's contract provided for automatic yearly renewal on the anniversary of his hire; however, Jamaica Hospital terminated the contract on January 13, 1995, and Plaintiff was transferred to TJH Medical Services, where he worked as an at-will employee. (Id. ¶¶ 7(d), (f), and (g).)

On or about May 29, 2001, several attending physicians at TJH Medical Services, including Plaintiff, criticized management at TJH Medical Services for its perceived pattern and practice of "selecting and promoting attendings and residents from [Gujarat,[1]] a distinct region of

[1] At various points, Plaintiff refers to people who originate from Gujarat as "Gujurati," "Gurjuranti," and "Gujarati." For consistency, I will utilize the term "Gujarati".

India which is culturally and linguistically distinct from others." (Id. ¶ 7(h).) Subsequent to Plaintiff's (and others') complaints, the Chairman of the Department of Medicine stated that staff who complained about this preference for Gujaratis would not receive a raise and should be fired. Dr. William O'Connell, Dr. Santucci's deputy, stated that "something 'bad' may happen to those who complain[.]" (Id. ¶ 7(i).) On or about June 16, 2001, Plaintiff complained to Dr. Santucci about these actions.[2] Plaintiff complained again to Dr. Santucci on or around August 26, 2002 and September 30, 2002, claiming that he was denied "promotional opportunities and lucrative job assignments," based on his "creed," and because he is not Gujarati. (Id. ¶ 7(k).) Plaintiff also alleges that he criticized the preference of Gujarati staff to other "functionaries within the Department of Medicine, the Jamaica Hospital and TJH Medical Services, P.C." (Id. ¶ 7(l).) Plaintiff claims that he was denied raises for as much as $50,000 annually because of the Defendants' preference for Gujarati staff. (Id. ¶ 7(k).)

Furthermore, Plaintiff claims that in retaliation for his complaints about the Defendants' preferential treatment of Gujarati staff, he was denied "significant promotional opportunities and lucrative job assignments, and critically, termination of his employment relationship." (Id. ¶ 7(m).) Plaintiff alleges that on October 25, 2002, he complained to Margaret Johnson, TJH's Chief Corporate Compliance Officer and General Counsel, and Marks, TJH's Executive Director about his department's preference for Gujarati staff and his unfavorable assignments and lack of promotions caused by his complaints, and that Johnson and Marks suggested to Plaintiff that he resign. (Id. ¶ 7(n).) On June 1, 2004, in July 2004, and on September 14, 2004, Plaintiff

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[2] Plaintiff also alleges that on June 12, 2006, he complained to Dr. Santucci and the Department of Emergency Medicine about emergency department physicians "dumping" patients on the Department of Medicine. (Am. Compl. ¶ 7(j).)

complained "to functionaries" of the Department of Medicine and of TJH about his exclusion from "significant promotional opportunities and lucrative job assignments and a hostile work environment because he" is not Gujarati. (Id. ¶ 7(aa).) On or about September 14, 2004, Plaintiff was informed that he was "being watched," and TJH Executive Director Marks instructed Plaintiff to quit, which he refused to do. (Id. ¶ 7(bb).) In addition, Plaintiff alleges numerous instances in which he complained to Defendants regarding patient care issues. (See id. ¶¶ 7(o)-(z), (ii).)

On or around September 23, 2004, Plaintiff received a letter from Marks informing him that the employment agreement that he entered into in Jamaica Hospital was still in effect, and forwarding him a new agreement that prohibited Plaintiff from "moonlighting" at other medical institutions. (Id. ¶ 7(cc)-(ee).) This new limitation significantly reduced Plaintiff's income. (Id. ¶ 7(ff).) On October 21, 2004, Plaintiff requested from Marks that he be permitted to "moonlight," which other attending physicians had been permitted to do. (Id. ¶ 7(gg).) On October 29, 2004, Defendants represented to Plaintiff that he had resigned. (Id. ¶ 7(hh).) On November 10, 2004, Plaintiff confronted Marks with the allegation that his "resignation" was a retaliatory pretext with which to terminate him. (Id. ¶ 7(jj).) Defendants confirmed the following day that he was still compensated by Jamaica Hospital. (Id. ¶ 7(kk).) On or about November 12, 2004, Defendants terminated Plaintiff's employment, citing a clause in his 1994 employment contract. (Id. ¶ 7(ll).)

Plaintiff alleges that he was terminated "because he is not a [Gujarati], because he vociferously complained about departures from the standard of care owed to patients, because he complained about discrimination and because defendants sought to restrain and to monopolize the practice of medicine in a certain location." (Id. ¶ 7(nn).) In his Amended Complaint,

Plaintiff claimed violations of the overtime requirement of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*., national origin and race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq*., restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1, and a number of common law and other state claims. (See Id. ¶¶ 13-22.) Plaintiff now withdraws all claims except those arising under FLSA, Title VII, and the Sherman Act, and requests to amend the complaint to plead discrimination claims under Title VII and Section 1981. (See Pl. Mem. Opp. Mot. Dismiss, at 1 n.1, 12 n.3.) The court grants that request.

Defendants now move to dismiss the complaint for failure to state a claim.[3]

II. DISCUSSION

A. Standard of Review

In reviewing a motion to dismiss for failure to state a claim pursuant to Fed R. Civ. P. 12(b)(6), the court must accept all factual allegations in the complaint as true and draw all reasonable inferences from those allegations in the light most favorable to the plaintiff. See Albright v. Oliver, 510 U.S. 266, 268 (1994); Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999). The complaint may be dismissed only if "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hoover v. Ronwin, 466 U.S. 558, 587 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In deciding such a motion, the "issue is not whether a

[3] Defendants move that this action be dismissed as against Dr. William O'Connell for failure to serve him with a copy of a complaint. (Def's' Mem. Supp. Mot. Dismiss at 2 n.1.) As Plaintiff does not contest this issue, I grant Defendants' motion on this ground.

plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996) (internal quotations omitted).

B. Plaintiff's Claims

1. Fair Labor Standards Act

FLSA requires payment of one and one half an employee's hourly wage for all hours worked over forty in a week, subject to certain exceptions. 29 U.S.C. § 207(a). Defendants argue that Plaintiff's FLSA claim must be dismissed because Plaintiff is a "learned professional," who is exempt from FLSA's overtime requirement because he was "employed in a bona fide . . . professional capacity[.]" (Def's' Mem. Supp. Mot. Dismiss at 3 (citing 29 U.S.C. § 213(b)(1); 29 C.F.R. 541.301(a)-(c)).)

Plaintiff concedes that his employment for Defendants was that of a "learned professional," but argues that Defendants were required to pay him overtime because he was not a salaried employee, a requirement of Section 213(b)(1), but rather was an hourly employee. (Pl's Mem. Opp. Def's' Mot. Dismiss at 11.) Plaintiff bases this contention on his pay records, which include an hourly and a weekly wage rate. (Id.) Accepting Plaintiff's unsworn testimony that his pay records reflect an hourly rate,[4] Plaintiff's argument is without merit. The critical inquiry in considering whether an employee is salaried or hourly is not whether a pay record indicates an hourly basis, but rather "if under his employment agreement he regularly receives

[4] Defendants allege that documents contained in Exhibit B of its motion are pay records for Plaintiff, and that Exhibit B should be considered in evaluating Defendants' motion. (Def's' Mem. Supp. Mot. Dismiss at 3 n.2, Ex. B.) While this court may consider documents incorporated by reference in a motion under Fed. R. Civ. P. 12(b)(6), see Nechis v. Oxford Health Plans, Inc., 421 F.3d 96, 100 (2d Cir. 2005), Plaintiff in his Amended Complaint does not refer to Defendants' payment method. I shall therefore refrain from considering Defendants' Exhibit B.

each pay period on a weekly, or less frequent basis, *a predetermined amount* constituting all or part of his compensation, *which amount is not subject to reduction* because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a) (emphasis added); see also Bongat v. Fairview Nursing Care Ctr., Inc., 341 F. Supp. 2d 181, 184 (E.D.N.Y. 2004). Plaintiff does not allege that his salary was not predetermined, or was subject to variation depending on the work performed. Therefore, his argument that he was an hourly employee is without merit, and this claim must be dismissed.

2. Title VII

Next, Defendants contend that Plaintiff's Title VII claims must be dismissed because (1) Plaintiff refused to sign an employment agreement, which forecloses suit under Title VII, and (2) Plaintiff failed to show that a similarly situated employee was treated any differently than he was based on national origin. (Def. Mem. Supp. Mot. Dismiss at 5-7.) Further, Defendants argue that Plaintiff's Title VII discrimination claim is time-barred to the extent that it alleges discriminatory conduct that occurred before June 1, 2004, more than 300 days before Plaintiff filed a complaint to the U.S. Equal Employment Opportunity Commission ("EEOC").

a. Retaliation

Defendants argue that Plaintiff's claim cannot survive because he refused to sign a reasonable employment agreement. However, Defendants' factual representation is belied by Plaintiff's Amended Complaint, in which Plaintiff alleges that on or around September 23, 2004, he was informed that an employment agreement that had been terminated after he left employment with Jamaica Hospital was newly in effect, and that in addition TJH prohibited him from "moonlighting". (Am. Compl. ¶¶ 7(cc)-(ee).) Plaintiff does not allege that he refused to abide by this requirement, but rather that he requested (unsuccessfully) that Marks permit him to

"moonlight," and that Marks subsequently informed him that he had resigned, allegedly in retaliation for his complaints about discriminatory treatment. (Id. ¶¶ 7(gg)-(hh)), (jj).) Although Defendants might dispute these allegations, this court is obligated to accept Plaintiff's allegations as true under Fed. R. Civ. P. 12(b)(6) ("Rule 12"). Under Rule 12 and the liberal pleading standards set forth in Fed. R. Civ. P. 8(a)(2), Defendants' factual assertion that Plaintiff refused to sign an employment contract is unavailing because it is belied by the facts alleged in the Amended Complaint, and permissible inferences therefrom. Thus, the Second Circuit case that Defendant relies on, Jetter v. Knothe Corp., 324 F.3d 73 (2d Cir. 2003), is distinguishable, both because it considered a motion for summary judgment under Fed. R. Civ. P. 56 and because in that case the Plaintiff "expressed his desire to be bought out of his contract." Knothe Corp., 324 F.3d at 76.

Defendants' second argument, that Plaintiff's Title VII claims cannot survive because they do not sufficiently allege preferential treatment of similarly situated staff of a different national origin, is a closer call. However, I find that Plaintiff's claim for retaliation under Title VII survives a motion to dismiss under the liberal pleading standards of Fed. R. Civ. Pro. 8(a)(2) ("Rule 8"). In Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), the Supreme Court held that complaints alleging employment discrimination are subject to the same basic pleading threshold in a motion to dismiss as all other actions save for fraud or mistake: under Rule 8, the plaintiff must "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Id. at 512 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

In his Amended Complaint, Plaintiff alleges that Defendants constructively terminated him for his complaints that Defendants treat staff of Gujarati descent better than other medical staff, including himself. Although Plaintiff does not allege his national origin, the allegations set

forth in the Amended Complaint give rise to the inference that he is not Gujarati. As such, Plaintiff has placed Defendants on fair notice that he claims that he was fired in retaliation for complaining of discrimination on the basis of national origin, i.e. because he complained that staff from Gujarati are treated preferentially *vis à vis* staff like himself who are not Gujarati. Hence, Plaintiff has satisfied the liberal pleading standard set forth in Rule 8 and discussed in Swierkiewicz.

Lastly, to the extent that Defendants argue that Plaintiff's retaliation claim cannot survive because the purported retaliatory conduct was based on complaints of discrimination that do not themselves present cognizable Title VII claims, dismissal is not appropriate on this ground. A Title VII claim for retaliation may proceed even where the underlying discrimination claim is without merit so long as plaintiff had "a good faith reasonable belief that the underlying challenged actions of the employer violated the law." Gregory v. Daly, 243 F.3d 687, 700-01 (2d Cir. 2001) (citations and quotation marks omitted). I find that Plaintiff has alleged facts sufficient to show that he had a good faith reasonable belief that Defendants by favoring persons of a different ethnicity than his violated anti-discrimination laws.

The unpublished district court cases cited by Defendants in support of their position that Plaintiff's complaint must be dismissed on this basis are easily distinguishable. In George v. N.Y. City Health & Hosp. Corp., 02-Civ.-1818, 2003 U.S. Dist. LEXIS 9817 (S.D.N.Y. June 11, 2003), the district court reconsidered an earlier dismissal of an employment discrimination action under the stringent standards of Fed. R. Civ. P. 60(b)(6), primarily for lack of subject matter jurisdiction. Id. at *1-*2. In Jenkins v. N.Y. City Transit Auth., 00-Civ.-6310, 2002 U.S. Dist. LEXIS 15546 (S.D.N.Y. Aug. 21, 2002), *pro se* defendant's Title VII claim was found to be time-barred. Id. at *7-*8. In Straker v. Metro. Transit Auth., 03-Civ.-1756, 2005 U.S. Dist.

LEXIS 30956 (E.D.N.Y. Dec. 5, 2005), there was no Title VII claim asserted. In Valle v. Bally Total Fitness, 01-Civ.-11614, 2003 U.S. Dist. LEXIS 17093 (S.D.N.Y. Sept. 30, 2003), unlike in this case, plaintiff failed "to incorporate *any* factual allegations that would indicate how his race, gender, age, or national origin played a role in" the employer's decision to terminate his employment. Id. at *8 (emphasis supplied). Finally, in Marshall v. Nat'l Ass'n of Letter Carriers Br. 36, 03-Civ.-1361, 2003 U.S. Dist. LEXIS 19918 (S.D.N.Y. Nov. 7, 2003), the judge found that *pro se* plaintiff did assert a claim under Title VII, but then held that this claim was barred by principles of claim and issue preclusion. Id. at *19-*27. Given that Defendants have failed to cite any persuasive authority that would permit this court to dismiss Plaintiff's Title VII retaliation claim, this court denies their motion to dismiss this claim.

b. Discrimination and Individual Liability

On the other hand, Plaintiff concedes that he fails to state a claim under Title VII for discrimination, and that Title VII does not support a claim for individual liability. (Pl. Mem. Opp. Mot. Dismiss at 12 n.3.) Plaintiff requests to amend the Amended Complaint to clarify his discrimination claims under Title VII and Section 1981 as to the individual defendants. (Id.) As Plaintiff has amended his Complaint, and Defendants do not consent to Plaintiff amending the Amended Complaint a second time (see Def. Mem. Supp. Mot. Dismiss at 8-9), Plaintiff may amend his complaint again only by leave of court, which "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The decision to grant a request for leave to amend a complaint is within the discretion of the district court. Foman v. Davis, 371 U.S. 178, 182 (1962); Ching v. United States, 298 F.3d 174, 180 (2d Cir. 2002). "Leave to amend should be freely granted, but the district court has the discretion to deny leave if there is a good reason for it, such as futility, bad faith, undue delay, or undue prejudice to the opposing party." Min Jin v. Metro. Life Ins.

Co., 310 F.3d 84, 101 (2d Cir. 2002). Defendants argue that amending the complaint would be futile because Plaintiff's claims are legally deficient. (Def's' Mem. Supp. Mot. Dismiss at 8-9.) Contrary to Defendants' position, this court finds that Plaintiff has stated a Title VII retaliation claim. Furthermore, this court is not prepared at this juncture, without knowing the precise basis of Plaintiff's national origin discrimination claim, to declare the claim to be without merit. I therefore grant Plaintiff's motion, and direct Plaintiff to file an amended complaint within thirty (30) days of the issuance of this Memorandum and Order.

However, I partially grant Defendants' motion to dismiss Plaintiff's Title VII discrimination claim on the ground that it is time-barred.[5] For a Title VII discrimination claim to survive, the plaintiff must show that he or she filed a charge with the EEOC up to 300 days after the unlawful practice happened. AMTRAK v. Morgan, 536 U.S. 101, 109-10 (2d Cir. 2002). Plaintiff does not contest that he filed a complaint with the EEOC on March 28, 2005, based on alleged discriminatory conduct that happened before and after June 1, 2004. I therefore hold time-barred the portion of Plaintiff's discrimination claim that alleges discriminatory conduct before June 1, 2004.[6]

3. Sherman Act

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[5] Plaintiff's Title VII retaliation claim accrued on November 12, 2004, the day he was allegedly pretextually terminated. As this claim arose well within the requisite statute of limitations, Plaintiff's retaliation claim is not time-barred.

[6] Plaintiff's allegations of discriminatory treatment throughout his employment remain relevant to the case at bar. Under the "continuing violation" doctrine, a plaintiff may allege facts outside the limitations period as additional proof of a discrimination claim. See, e.g., Fitzgerald v. Henderson, 251 F.3d 345, 359 (2d Cir. 2001) ("Under [the continuing violation] doctrine, if a plaintiff has experienced a continuous practice and policy of discrimination, . . . the commencement of the [Title VII] statute of limitations period may be delayed until the last discriminatory act in furtherance of it.") (internal quotations omitted), cert. denied, 536 U.S. 922 (2002).

Plaintiff's remaining claim is that Defendants' prohibition on his "moonlighting" violated the Sherman Act because it placed "unreasonable burdens on the free and uninterrupted flow of commerce." (Pl. Mem. Opp. Mot. Dismiss 15.) Defendants argue that Plaintiff lacks standing to assert a Sherman Act claim. (Def. Mem. Supp. Mot. Dismiss 7-8.)

It is "well settled that in order to have standing to prosecute private antitrust claims, plaintiffs must show more than that the defendants' conduct caused them an injury." Balaklaw v. Lovell, 14 F.3d 793, 796 (2d Cir. 1994). "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). This standing requirement reflects Congress's intent that "the antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" Brunswick, 429 U.S. at 488 (quoting Brown Shoe v. United States, 370 U.S. 294, 320 (1962)).

With these principles in mind, it is clear that Plaintiff has failed to assert an antitrust claim. The crux of Plaintiff's Sherman Act claim is that the Defendants impermissibly restrained trade by prohibiting him from "moonlighting." However, Plaintiff has not alleged that Defendants' prohibition on "moonlighting" has resulted in lower quality medical services in the area or has prevented other medical staff from competing for these medical services. Indeed, Plaintiff's allegation that the Defendants' prohibition on "moonlighting" was aimed individually at him in retaliation for complaints of discrimination strongly suggests that whatever impact the prohibition had on Plaintiff, there was no wider impact or intended effect on commerce. Although the parties have not cited any directly relevant Second Circuit precedent regarding

hospital limitations on the professional practices of its medical staff, and this court is not aware of any, this court is persuaded that Defendants' alleged restraint of Plaintiff's "moonlighting" does not state an "antitrust injury" or harm to competition generally inasmuch as the limitation imposed does not suggest a sacrifice of "quality medical services at competitive prices." Purgess v. Sharrock, 806 F. Supp. 1102, 1107 (S.D.N.Y. 1992) (citing Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1448 (11th Cir. 1991); Robles v. Humana Hospital Cartersville, 785 F. Supp. 989, 999 (N.D. Ga. 1992); Anesthesia Advantage, Inc. v. The Metz Group, 759 F. Supp. 638, 646 (D. Co. 1991)).

The Supreme Court case cited by Plaintiff in support of his claim that a physician who is subject to a practice limitation by a medical establishment has standing to bring a Sherman Act claim, Summit Health v. Pinhas, 500 U.S. 322, 326 (1991), is not directly relevant to the instant motion. Summit Health involved a hospital policy requiring surgeons to perform eye surgeries with an assistant surgeon, which considerably increased the cost of performing the medical service and limited the number of practices that could perform the procedure. Id. at 326. The Supreme Court considered whether the plaintiff pled a sufficient amount of interstate commerce to invoke the protections of the Sherman Act, not whether the plaintiff had standing. Id. at 330. Moreover, unlike the plaintiff in Summit Health, there is no allegation in the instant motion that Defendants' actions had an impact on the market for medical services in the relevant area.

I therefore GRANT Defendants' motion on this ground and dismiss Plaintiff's antitrust claim.

III. CONCLUSION

Defendants' motion to dismiss as to Plaintiff's FLSA and Sherman Act claims are GRANTED, and their motion to dismiss Plaintiff's Title VII retaliation claim is DENIED. Defendants' motion to dismiss Plaintiff's Title VII discrimination claim is DENIED, except to the extent that I GRANT their motion to find Plaintiff's Title VII discrimination claim partially time-barred. Furthermore, this action is dismissed as against Dr. William O'Connell for failure to serve. Plaintiff's motion to amend his complaint to allege discrimination in violation of Title VII and Section 1981 is GRANTED.

SO ORDERED.

Dated: September__, 2006
Brooklyn, NY

/s/ Nicholas G. Garaufis
NICHOLAS G. GARAUFIS
United States District Judge